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Michael N. Milby, Clerk of Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MARK NEWBY,

Plaintiff,

VS.

ENRON CORP., et al.,

Defendants.

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CIVIL ACTION NO.H-01-3624
(Consolidated)

**RICHARD A. CAUSEY'S
MOTION TO POSTPONE DISCOVERY AND TO STAY RESPONSIVE PLEADINGS
DURING PENDENCY OF CRIMINAL PROCEEDINGS**

Defendant Richard A. Causey moves to postpone discovery propounded to him and stay his obligation to file pleadings in response to complaints in any and all of the lead, consolidated, coordinated or related cases in these proceedings pending the conclusion of criminal proceedings against him. Such a postponement/stay is essential to preserve Mr. Causey's constitutional rights.

I. INTRODUCTION

Mr. Causey was the Chief Accounting Officer ("CAO") of Enron from approximately December 1996 to February 2002. The collapse of Enron gave rise to a myriad of civil lawsuits as well as a federal criminal investigation, all of which essentially cover the same subject matter. Mr. Causey is a defendant in almost all of the civil cases, including *Newby* and most of the cases transferred to this Court or coordinated with these cases pursuant to MDL No. 1446. Mr. Causey has recently been indicted on matters central to the civil litigation. *See United States of America v.*

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Jeffrey K. Skilling and Richard A. Causey; Cr. No. H-04-25, filed February 18, 2004.¹ There is clear overlap between the civil cases before this Court and the criminal case against Mr. Causey. Accordingly, Causey seeks the same relief from discovery and from filing any responsive pleadings that this Court recently granted to Defendants Kenneth Rice and Kevin Hannon in these same cases.

Granting Messrs. Rice and Hannon's motion to postpone answer and stay discovery, this Court referenced another such Order, which held that a stay is necessary for an indicted defendant "when the clear overlap of issues in the criminal and civil cases [make] the potential for self-incrimination more likely."² Staying Mr. Fastow's obligation to file an answer (and later Mr. Rice's and Mr. Hannon's), the Court held that "requiring [defendant] to file an answer in *Newby*, now that his motion to dismiss has been denied, would have the . . . effect" of unnecessarily forcing him "to choose between invoking his Fifth Amendment privilege and risking severe prejudice in the civil action." (Exhibit 3, p. 2). The same Fifth Amendment considerations support a stay of Mr. Causey's obligation to answer and to respond to discovery. Answering any new or amended complaints paragraph by paragraph and/or responding to discovery would force Mr. Causey to a "*Hobson's choice*" of asserting his Fifth Amendment privilege or defending the civil case. Therefore, Mr. Causey requests that this Court postpone discovery from him and stay his obligation to file pleadings in response to the complaints in any and all of the lead, consolidated, coordinated or related cases until the criminal proceedings against him are concluded.

II. FACTS

A. Mr. Causey Is Confronted With A Constitutional Predicament.

¹ This Superseding Indictment is attached as Exhibit 1.

² See Memorandum and Order Re: Motions Filed by Enron Insider Defendant Andrew S. Fastow, entered March 25, 2003 (Instrument no. 1298) attached as Exhibit 2 at p. 22; Order staying Fastow's obligation to answer entered April 29, 2003 (Instrument no. 1353) attached as Exhibit 3.

Plaintiffs in *Newby* and the MDL No. 1446 actions seek responsive pleadings and discovery from Mr. Causey regarding his roles at Enron and related matters. The United States Government has indicted Mr. Causey over the same issues. If Causey files responsive pleadings to the complaints and responds to the civil discovery, he jeopardizes his Fifth Amendment privilege against self-incrimination by creating the possibility his answers will aid in the prosecution of him. If Mr. Causey invokes his Fifth Amendment privilege, he risks severe prejudice in the civil actions that could amount to a forfeiture of his due process right to defend the case. Mr. Causey thus faces an impossible choice, a so-called *Hobson's choice*, where selection of either alternative will damage a constitutional right.

B. The Civil Case Allegations Against Mr. Causey Primarily Relate to the “Fraudulent Scheme” at Enron

Plaintiffs' allegations against Mr. Causey in the consolidated civil actions primarily relate to the “fraudulent scheme” at Enron during his tenure as CAO. *See, e.g., Newby*, First Amended Consolidated Complaint, ¶¶ 68, 88, 119, 126, 134, 141, 145, 157, 164, 179, 197, 221, 224, 263, 282, 292, 309, 317, 329, 336, 343, 366, 377, 388, 392, 398, 401-03, 475, 480, 581, 653, 675, 694, 716, 736, 742.19, 751, 913, 993, 1006, 1016.25 and 1016.27. Even though Plaintiffs brought these cases under a wide spectrum of legal theories, including securities fraud, RICO, and conspiracy, the core factual allegations, at least as to Mr. Causey, do not vary from case to case regardless of legal theory. All Plaintiffs allege that Mr. Causey and other Defendants inflated Enron's stock price as part of a fraudulent scheme to deceive Plaintiffs and to enrich themselves. *See, e.g., id.*

C. The Criminal Allegations Against Mr. Causey Mirror The Civil Allegations.

The criminal allegations against Mr. Causey focus on the same activities and allegations as the consolidated and MDL No. 1446 civil actions—Mr. Causey’s alleged “scheme to defraud” in connection with Enron:

....defendants Jeffrey K. Skilling and Richard A. Causey and their conspirators engaged in a wide-ranging scheme to deceive the investing public, the SEC, credit rating agencies and others...about the true performance of Enron’s businesses by: (a) manipulating Enron’s finances so that Enron’s publicly reported financial results would falsely appear to meet or exceed analysts’ expectations; and (b) making public statements and representations about Enron’s financial performance and results that were false and misleading in that they did not fairly and accurately in all material respects represent Enron’s financial condition and performance, and omitted to disclose facts necessary to make those statements and representations truthful and accurate.

United States v. Jeffrey K. Skilling and Richard A. Causey; (S.D.Tx. 2004) Cr. No. H-04-25 at ¶ 10.

Due to the overlap between the criminal and civil cases, Mr. Causey cannot respond to discovery in the consolidated civil actions without providing information to the government for use in its criminal investigation. To avoid providing direct assistance to the criminal investigation, Mr. Causey would have to invoke his Fifth Amendment privilege in response to civil discovery. However, even if Mr. Causey was to exercise his Fifth Amendment privilege in response to discovery, his invocation of that privilege on a question-by-question basis will provide clues for the government to use in its investigation and prosecution of him, and he would face the possibility of a negative inference being drawn in the civil case from that invocation of the Fifth Amendment.

III. ARGUMENT AND AUTHORITIES

A. Fifth Circuit Law Requires Postponement Of Discovery To Protect The Constitutional Rights Of Litigants Subject To Criminal Proceedings.

When confronted with a party facing a *Hobson’s* choice, both this Court and the Fifth Circuit have fashioned a remedy that balances the interests of litigants in pursuing their civil damages claim

while still protecting the rights of an individual subject to criminal investigation. *See Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088-89 (5th Cir. 1979); *Kmart Corp. v. Aronds et al.*, Civ. No. H-96-1212, p. 4-6 (S.D. Tex. Dec. 11, 1996). That remedy postpones responsive pleadings, discovery (and, if necessary, trial) until after conclusion of all criminal proceedings. Mr. Causey seeks that remedy.

In *Kmart*, this Court wrote: “Courts have the inherent authority to stay civil proceedings during the pendency of parallel criminal prosecutions when required by the interests of justice.” *KMart*, Civ. No. H-96-1212, p. 4. The Fifth Circuit held that a district court *should* abate discovery in a civil action when proceeding with that discovery would force a litigant to choose between responding to the request and exercising the Fifth Amendment privilege. *Wehling*, 608 F.2d at 1087-88; *see also Brumfield v. Shelton*, 727 F. Supp. 282, 284 (E.D. La. 1989).

An individual party to a civil action has, “in addition to his Fifth Amendment right to silence, a due process right to a judicial determination of his civil action.” *Wehling*, 608 F.2d at 1087-88. “The [Supreme] Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence....” *Id.* at 1088 (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). A district court may not follow any procedure that “require[s] a party to surrender one constitutional right in order to assert another.” *Id.* Forcing a litigant to invoke the Fifth Amendment in the course of civil litigation amounts to a forfeiture of the due process right to a judicial determination of the civil action. *Id.* at 1087-88; *see also Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987); *SEC v. Dresser Indus., Inc.* 628 F.2d 1368, 1375-76 (D.C. Cir. 1980); *Trustees of the Plumbers & Pipefitters Nat’l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1138-39 (S.D.N.Y. 1993).

Following *Wehling*, this Court stayed civil proceedings against all defendants in the *Kmart* action, where there were some civil defendants “facing criminal indictments and many of the others involved in the alleged scheme to defraud Kmart face[d] a real risk of self-incrimination.” *Kmart*, Civ. No. H-96-1212, p. 6. In *Wehling*, the Fifth Circuit held that the district court should have postponed the civil action for three years, rather than placing one of the parties in the position of having to invoke the Fifth Amendment in response to discovery. *See Wehling*, 608 F.2d at 1088-89.

B. The Pending Criminal Indictment Against Mr. Causey Requires A Stay Of Any Discovery Sought From Him In The Civil Action.

“The first question to be resolved is the extent to which the issues in the criminal case overlap with those present in the civil case, since self-incrimination is more likely if there is significant overlap.” *Plumbers & Pipefitters*, 886 F. Supp. at 1139. There cannot be more overlap between the criminal prosecution and the civil cases than exists here. Mr. Causey was indicted in connection with his position at Enron and the alleged related fraud. Causey’s connection to Enron and his alleged participation in the fraudulent scheme related to Enron’s stock price likewise form the basis for the allegations in the consolidated civil cases.

The nexus between the civil allegations and criminal investigation in this case satisfies the requirements for postponement of discovery. Just as this Court did in *Kmart*, the Fifth Circuit found the factual nexus between the civil and criminal proceedings sufficient where both proceedings involved the same underlying transactions. *See Wehling*, 608 F.2d at 1088-89. In the absence of a discovery postponement, Mr. Causey would wrongfully and unnecessarily be forced into a choice of sacrificing his Fifth Amendment privilege or invoking that privilege and risking severe prejudice in the defense of this civil action.

The balancing of interests in this case favors a postponement of discovery as to Mr. Causey. Mere “inconvenience and delay to plaintiffs” does not provide a sufficient basis to make the showing of undue burden required for denial of a stay. See *Volmar Distribs., Inc. v. New York Post Co.*, 152 F.R.D. 36, 40. “[U]nder settled authority the Fifth Amendment is the more important consideration.” *Id.* Although postponement of discovery may cause some delay in Plaintiffs’ prosecution of claims against Mr. Causey, Plaintiffs may still proceed against other individual and entity defendants and obtain discovery from them in this action. Given the likely volume of discovery, temporarily postponing Plaintiffs’ ability to pursue discovery from one individual defendant will impose little inconvenience or delay to Plaintiffs. Thus, the balance of interests favors a postponement of discovery from Mr. Causey.

C. Fifth Amendment Privilege Applies At Every Stage Of The Proceeding, Including The Pleading And Answer Stage.

The Fifth Amendment privilege applies at every stage of a civil proceeding, including the pleading stage. See, e.g., *North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987); *Rogers v. Webster*, 776 F.2d 607, 611 (6th Cir. 1985); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983); *Nutramax Lab., Inc. v. Twin Lab., Inc.*, 32 F. Supp. 2d 331, 333-34 (D. Md. 1999). The privilege “protects an individual not only from involuntarily becoming a witness against himself in a criminal proceeding but also from answering specific allegations in a [civil] complaint . . . where the answers might incriminate him in future criminal actions.” *North River Ins. Co.*, 831 F.2d at 486-87. A paragraph-by-paragraph supplemental answer to any amended complaint, as required under Rule 8, compels Mr. Causey to make judicial admissions or denials that might later be used against him in the criminal proceeding. See, *id.*; see also *National Acceptance Co.*, 705 F.2d at 927 n.5. Thus, when a civil defendant faces parallel criminal charges, as Mr. Causey does, he may

invoke the Fifth Amendment in lieu of admitting or denying the allegations of the complaint, just as he may invoke the Fifth Amendment in response to discovery requests. *See, National Acceptance Co.*, 705 F.2d at 927.

D. A Stay Of Mr. Causey's Supplemental Answers Is Appropriate.

Whether to answer allegations or plead the Fifth Amendment in a civil suit raises the same constitutional dilemma as responding to civil discovery. *Wehling*, 608 F.2d at 1089 (litigant not forced to choose between Fifth Amendment privilege and prejudice to civil lawsuit); *Kmart*, Civ. No. H-96-1212, p. 4-6 (civil and criminal defendants should not have to choose between making potentially incriminating statements in a civil case or asserting Fifth Amendment privilege); *see also Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976) (when litigant chooses to invoke the Fifth Amendment privilege in a civil suit, an adverse inference can be drawn by the trier of fact). Because of the potential prejudice, the choice between answering allegations and invoking the Fifth Amendment presents the same dilemma that was before this Court and the Fifth Circuit in *Kmart* and *Wehling*, respectively.

IV. CONCLUSION

This Court acknowledged the same constitutional dilemma confronting Mr. Causey in its orders staying the civil case against Mr. Fastow, Mr. Rice and Mr. Hannon. The Court's reasoning supports a stay of the civil proceedings against Mr. Causey until the resolution of his criminal actions. To protect the same constitutional rights that this Court sought to protect by staying Mr. Fastow's, Mr. Rice's and Mr. Hannon's obligation to further answer and respond to discovery, the Court should stay both discovery from Mr. Causey and his duty to further answer or otherwise respond to the complaints in any and all of the lead, consolidated, coordinated or related cases in these proceedings pending the outcome of his criminal trial. The legal and factual bases for a

postponement will be the same in each case and therefore need not be brought to the Court's attention each time an answer date draws near in a related case. In the event this Court denies Mr. Causey's motion, Mr. Causey respectfully request that this Court provide additional time to object and/or respond, answer and to seek other appropriate relief.

Respectfully submitted,



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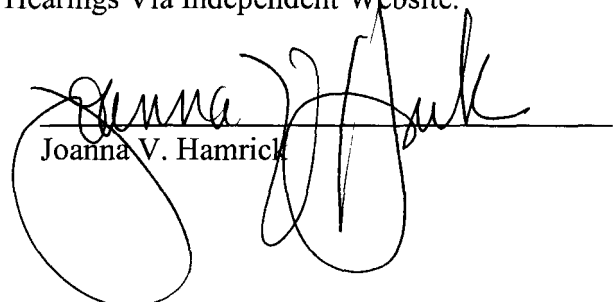
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the pleading was served on all counsel of record on the Service List on March 12, 2004 via posting to www.es13624.com in compliance with the Court's Order Regarding Service of Papers and Notice of Hearings Via Independent Website.



Joanna V. Hamrick

The Exhibit(s) May

Be Viewed in the

Office of the Clerk